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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC GORDON PAIT, Defendant and Appellant.	B282188 (Los Angeles County Super. Ct. No. YA094507)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Gordon Pait appeals from a judgment entered after a jury found him guilty of possession of a firearm by a felon, possession of ammunition by a felon, and infliction of corporal injury on a cohabitant. After finding a bail enhancement allegation to be true, the trial court sentenced him to six years, eight months in prison. Pait contends the trial court committed reversible error in admitting evidence of an uncharged prior incident of domestic violence and in instructing the jury on how to consider such evidence. He also asks this court to review the record of the in camera hearing on his *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) In a supplemental brief, filed after oral argument, he contends the matter must be remanded to allow the trial court to determine whether he has the ability to pay certain fines and assessments. Finding no error and no need for remand, we affirm the judgment.

BACKGROUND

I. Prosecution Case

A. The Charged Offenses

On May 23, 2015, Pait committed domestic violence against his girlfriend/cohabitant, Tara J. She testified to the following at trial:

While Tara was cooking dinner her cell phone rang, and she noticed she had missed a call from Pait's friend. She went into the bedroom, told Pait his friend had called, and gave him her phone in case his friend called back. Previously, Tara had given Pait the passcode to unlock her phone. She returned to the kitchen.

Pait entered the kitchen, pointed a gun at Tara's head and told her, "You're a dead bitch." He accused her of "cheating" and giving money to another man. Apparently, Pait had reviewed

information on Tara's cell phone. Tara tried to respond, but Pait struck her in the face with his hand.

Pait told Tara to go into the bedroom. She complied, and he closed the bedroom door behind them. He again pointed the gun at her head, called her "a dead bitch," and accused her of giving money to another man. She denied the accusation and told him the man was someone she knew from work, but he disputed her denial. He told her to go back to the kitchen and finish cooking dinner. She complied.

While Tara was cooking, Pait reentered the kitchen, and the argument resumed, with him accusing her of giving money to the other man, her denying the accusation, and her accusing him of infidelity. He told her to "shut up before he put [her] face into the pot" of food she was cooking. She stopped speaking, and he left the house.

When Tara woke up the following morning, her eye was swollen shut as a result of Pait striking her on the face. Her daughter (from a prior relationship) observed the injury. Tara told her daughter about the incident.[1] Later the same day, Tara's friend visited the home, learned about the incident, and called the police, over Tara's objection. A police officer responded to the home and took a report.[2] He observed swelling and redness on Tara's left eye.[3] Pait was not present when the officer was in the home.

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[1] Tara's daughter testified at trial that Tara informed her Pait "pulled a gun" on her and hit her.

[2] The officer testified at trial.

[3] The jury viewed photographs of the injury to Tara's eye.

Later the same day, Tara changed the locks at the residence. When Pait attempted to enter with his key and was unable to do so, he rang the doorbell.[4] Tara did not open the door. She dialed 911, and officers responded and arrested Pait. Officers asked Tara if there were any weapons in the home, and she responded negatively, after observing an empty box in the closet where Pait usually stored the gun he had used during the incident.

Two days later, on May 26, 2015, Tara found the gun Pait had pointed at her under their bed. She called the police and officers responded. They recovered a loaded .357-caliber revolver from under the bed, a loaded .22 caliber revolver from a shelf in the bedroom closet, and ammunition for the .357-caliber revolver from the same shelf.[5]

According to Tara's trial testimony, her eye remained swollen for two to three weeks after Pait struck her. Ten days after the incident, she sought medical treatment for her eye. She also had difficulty chewing after the incident due to pain on the side of her face. She testified that an X-ray revealed she had a fractured cheekbone. She stated she lost 35 pounds because she was unable to eat solid food for months.

Tara further testified she began suffering seizures after Pait struck her, and she was hospitalized around 10 times due to the seizures. A hospital emergency room physician, who

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[4] Earlier the same day, before Tara changed the locks, Pait returned to the home, took a shower, and left. He and Tara did not speak.

[5] One of the officers who recovered the guns and ammunition testified at trial.

examined Tara on June 28, 2015, testified at trial that although Tara experienced symptoms of seizures (e.g., convulsions, loss of speech), she was suffering from pseudo-seizures (as opposed to actual seizures) and a conversion disorder, caused by emotional trauma or psychiatric issues. The physician did not believe Tara was malingering.

B. Uncharged Prior Incident of Domestic Violence

T.A. testified at trial about an uncharged February 26, 2007 incident of domestic violence. When it occurred, T.A. and Pait were friends, their dating relationship having ended previously.

While T.A. was visiting Pait at his home, Pait answered a call on her cell phone, placing the phone in speakerphone mode. According to T.A., Pait became upset when he heard the male caller and asked the man "why he was calling his woman's phone." T.A. told Pait she was not "his woman" and asked him why he answered her phone. The caller requested to speak with T.A., and she asked Pait to give her the phone. Using profanity, Pait inquired if the caller was having a sexual relationship with T.A. The caller denied such a relationship, and Pait accused him of lying.

Then Pait slapped and punched T.A. on her face, repeatedly. He retrieved a gun from his closet, pointed it at her, and told her, "I ought to shoot your ass right now." He struck her on the forehead with the butt of the gun. After she fell to the floor, he kicked her stomach and threw her across a bed.

T.A. screamed for help. Pait's sister knocked on the door. Pait told T.A. to sit on the bed, and he left the room. When he returned, T.A. asked if she could use the bathroom. Pait refused and left the room again. T.A. pretended to receive a call from her

daughter, whom she knew Pait loved like his own child. T.A. told him her daughter needed help with a personal issue.

Pait told T.A. she could "go take care of [her] daughter," but said, "you bring your ass back because I'll beat your ass all night long, I'm gonna bust your ear drums, so you make sure you bring your ass back." He would not allow her to take her phone or her bag with her when she left. "Before [she] ran out [of] the house," Pait grabbed her around her neck and choked her "to make sure [she] was coming back."

T.A. ran down the street to her mother's home, where she dialed 911. Officers responded, and she told them what happened. They took pictures of her injuries.[6] She later testified in court regarding the incident. She believed her "case was resolved in a fair way."

As a result of this incident of physical abuse, T.A. suffered a damaged ear drum, headaches, bruising on her head and face, and difficulty sleeping.

C. Stipulation

The parties stipulated that Pait had a prior felony conviction.

II. Defense Case

Pait called a detective and an officer who separately interviewed T.A. in 2007 about the uncharged incident of domestic violence. They each testified T.A. did not tell them significant portions of the physical abuse she testified to at trial (e.g., that Pait struck her with the gun, kicked her in the stomach, threw her across a bed, grabbed her around her neck and choked her).

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[6] The jury viewed photographs of the injuries to her face.

The detective who investigated the May 23, 2015 incident of domestic violence against Tara testified that during an interview, Pait identified the .357-caliber revolver Tara said he used and stated it was not necessary for the detective to have it processed for DNA or fingerprints, indicating the weapon was his.

Pait also called an emergency room physician as a medical expert, who reviewed Tara's medical records and testified that her injuries were minor ("minimal swelling" around her eye 10 days after the incident). The expert questioned whether T.A.'s cheekbone was ever fractured.

Pait's sister testified that 12 days after the charged incident, she saw Tara at a high school graduation, and Tara had no visible injury. She acknowledged Tara told her within a few days of the incident that Pait had hit her. She also testified she was present at Pait's home during the alleged uncharged 2007 incident, and she did not see Pait assault T.A. or hear T.A. scream for help.[7]

III. Verdicts and Sentencing

The jury found Pait guilty of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), and possession of ammunition by a felon (Pen. Code, § 30305, subd. (a)(1)). The jury found not true the enhancement allegations that in the commission of the corporal injury offense Pait personally used a firearm (Pen. Code, § 12022.5) and inflicted great bodily injury on Tara (Pen. Code, § 12022.7, subd. (e)). The jury found Pait not guilty of criminal threats (Pen. Code, § 422, subd. (a)) and two

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[7] We do not summarize here defense evidence that is not germane to our resolution of the issues on appeal.

counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) against Tara.

Pait waived his right to a jury trial on the enhancement allegation that at the time of the offenses he was released from custody on bail in a federal case within the meaning of section 12022.1, and the trial court found the allegation to be true.

The trial court sentenced Pait to six years, eight months in state prison: the upper term of four years for corporal injury on a cohabitant, a consecutive term of eight months for possession of a firearm by a felon (one-third the middle term), plus two years for the bail enhancement. The court also imposed a concurrent three-year upper term for possession of ammunition by a felon.

DISCUSSION

I. Admission of Uncharged Prior Incident of Domestic Violence

Pait contends the trial court violated his constitutional rights to due process and equal protection, and abused its discretion under Evidence Code section 352, in admitting evidence of the 2007 incident of domestic violence under Evidence Code section 1109.[8]

Ordinarily, evidence of a defendant's prior bad acts is inadmissible to prove his propensity to commit the charged offense, but may be admitted where relevant to prove a fact such as motive, intent, plan, etc. (§ 1101, subds. (a)-(b).) Section 1109, however, permits the admission of evidence of prior incidents of domestic violence to show a defendant's propensity to commit a charged incident of domestic violence, so long as the evidence of

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[8] Statutory references are to the Evidence Code unless otherwise noted.

the uncharged incident is not inadmissible under section 352 (i.e., "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury"). (§§ 352, 1109, subd. (a)(1).) Section 1109 also provides that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." (§ 1109, subd. (e).)

A. Proceedings Below

The prosecution sought to introduce at trial evidence of two uncharged prior incidents of domestic violence: the 2007 incident against T.A. discussed above and a 2005 incident against another woman.[9] The prosecution also described in its written motion six other alleged incidents of domestic violence, occurring between 1990 and 2000, that Pait perpetrated against women other than Tara. The motion noted the prosecution had provided the defense with police reports for all eight incidents. The motion also noted Pait was convicted in the 2005 and 2007 cases and sentenced to a five-year probation and a three-year prison term, respectively, based on negotiated pleas.

At the time it made its motion, the information available to the prosecution regarding the 2007 incident involving T.A. was less egregious than the incident to which T.A. testified at trial. Based on the police report, the prosecution informed the court in

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[9] We do not summarize the facts of the 2005 incident because the trial court excluded it, as discussed below, and Pait's contentions on appeal do not relate to the 2005 incident.

its written motion that Pait pointed a gun at T.A., threatened to shoot her, and slapped and punched her, after she received a call from a man on her cell phone. The court did not hear facts about Pait hitting T.A. with the gun, kicking her stomach, throwing her over a bed, grabbing her around the neck, or choking her.[10]

In a written opposition, Pait asked the trial court to exclude the uncharged 2005 and 2007 incidents of domestic violence, arguing they are inadmissible to show motive or intent under section 1101 because they do not involve the same woman as the charged domestic violence offense. He also argued the uncharged incidents do not show modus operandi because the facts of the incidents (uncharged and charged) do not have the requisite "distinctiveness." In his opposition, he did not address admissibility of the uncharged incidents under section 1109. Finally, he asked the court to exclude the uncharged incidents under section 352, arguing they "are highly prejudicial and outweigh any probative value."

At the December 6, 2016 hearing on the prosecution's motion, defense counsel argued the trial court should not admit evidence of the uncharged incidents under section 1109 because (1) the 2005 incident was outside the 10-year period and the 2007 incident was almost outside, (2) the uncharged incidents were more inflammatory than the charged incident, and (3) Pait disputed the facts of the uncharged incidents and therefore litigation of these incidents would consume a lot of time.

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[10] As discussed above, a detective and an officer testified in the current trial that T.A. did not disclose such facts when she was interviewed in 2007.

After hearing argument from the prosecutor, the trial court admitted evidence of the 2007 incident of domestic violence under section 1109 and excluded evidence of the 2005 incident. The court explained the 2007 incident involving T.A. was within the 10-year period set forth in section 1109, subdivision (e), and it was similar to the charged offense in that Pait pointed a gun at and threatened to shoot the victim and struck the victim with his hand. The court also noted that admitting only one incident mitigated the prejudicial impact and would cut in half the number of witnesses called to testify about the uncharged incidents.

B. Constitutional Claims

Pait contends the trial court violated his constitutional rights to due process and equal protection in admitting the uncharged incident of domestic violence under section 1109. In addition to disputing the contentions on the merits, the Attorney General argues Pait forfeited his constitutional claims because he did not object below to the admission of the evidence on these bases. Because Pait raises an ineffective assistance of counsel claim based on his trial attorney's failure to object, we address the claims on the merits.

Pait acknowledges in his opening appellate brief that California courts have rejected his claims that section 1109 violates a defendant's due process and equal protection rights because it allows the prosecution to present propensity evidence in domestic violence cases.

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court considered a due process challenge to section 1108, a parallel statute to section 1109, which allows admission of the defendant's prior sex crimes to show a

propensity to commit such crimes. The Court concluded the statute did not violate due process because it "preserve[d] trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value" under section 352. (*Falsetta*, at p. 907.)

Applying *Falsetta*, California appellate courts have consistently concluded section 1109, like section 1108, does not violate due process. "Admission of evidence of prior acts of domestic violence under section 1109 is similarly subject to the limitations of section 352. (§ 1109, subd. (a).) Under the reasoning of *Falsetta*, this safeguard should ensure that section 1109 does not violate the due process clause." (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) "In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)

Pait also complains that "section 1109 treats those accused of domestic violence differently from all other criminal defendants by allowing evidence of alleged other offenses to be admitted for all purposes, including the purpose of showing a propensity to commit crime." California appellate courts have rejected this equal protection challenge to section 1109, and we agree with their reasoning. (See *People v. Jennings*, *supra*, 81 Cal.App.4th at pp. 1310-1313; *People v. Price* (2004) 120 Cal.App.4th 224, 240-241.) "The evidentiary distinction drawn by section 1109 of the Evidence Code between domestic violence offenses and other offenses is relevant to the evidentiary purpose underlying this distinction." (*People v. Price,* at p. 240.) "The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusually

private and intimate context, easily distinguish these offenses from the broad variety of criminal conduct in general. Although all criminal trials are credibility contests to some extent, this is unusually—even inevitably—so in domestic and sexual abuse cases, specifically with respect to the issue of victim credibility. The Legislature could rationally distinguish between these two kinds of cases and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused." (*People v. Jennings*, at p. 1313.)

Pait's constitutional challenges to section 1109 are without merit.

C. Exercise of Discretion in Admitting Uncharged Incident of Domestic Violence

Pait contends the trial court abused its discretion in admitting the uncharged 2007 incident of domestic violence involving T.A. over his objection under section 352. He argues the "attack on [T.A.] was significantly more violent than the single punch which [Tara] alleged," and "its inflammatory prejudice so overshadowed any probative value."

"We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.) Moreover, we "may assess the trial court's ruling only on the facts made known to it at the time it made that ruling." (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.)

The information known to the trial court at the time it made its ruling was that Pait pointed a gun at T.A., threatened to shoot her, slapped her multiple times on her face, and punched

her once on her jaw. The incident described in the prosecution's motion, therefore, was very similar to the charged offense, except that Pait struck T.A.'s face multiple times, and Tara's only once. The 2007 incident, as described in the motion, was probative and not particularly inflammatory in light of the facts of the charged offense. At the time it made its ruling, the court could not have known T.A. would testify to facts she did not tell the police in 2007 (that Pait hit her with the gun, kicked her stomach, threw her over a bed, grabbed her around the neck, or choked her.)

In admitting evidence of the uncharged incident under section 1109, the trial court did not act in an arbitrary, capricious, or patently absurd manner. The incident occurred within the 10-year period set forth in section 1109. The probative value of Pait's history of domestic violence was not substantially outweighed by a danger of undue prejudice (based on the information the court knew at the time it made its ruling).

Even if the admission of this evidence did constitute error, it would be harmless error because it is not reasonably probable Pait would have obtained a more favorable result if the trial court had excluded the evidence. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750 [admission of other crimes reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818].) Pait was convicted of three offenses: possession of a firearm by a felon, possession of ammunition by a felon, and corporal injury on a cohabitant. There is no dispute Pait possessed the .357-calibar revolver and the accompanying ammunition. Regarding the corporal injury offense, Tara's daughter and the police officer who took the report both testified about the redness and swelling around her eye the day after the incident, and the jury viewed photographs and heard testimony about the medical treatment

she sought for her eye. It is not reasonably probable that in the absence of evidence of the uncharged incident of domestic violence the jury would have believed Tara sustained the eye injury in some manner other than Pait striking her.

The trial court did not abuse its discretion in admitting the evidence and, even if it did, Tara was not prejudiced by its admission.

II. CALCRIM No. 852

Pait contends the trial court erred in instructing the jury with CALCRIM No. 852. As given to the jury, the instruction states, in pertinent part:

"The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: upon T[.]A[.] on or about February 26, 2007.

[¶] . . . [¶]

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit criminal threats in violation of Penal Code section 422(a) as

charged in Count One; assault with a firearm in violation of Penal Code section 245(a)(2) as charged in Counts Three and Four; and/or inflicting an injury on his cohabitant and/or someone with whom he had a dating relationship that resulted in a traumatic condition in violation of Penal Code section 273.5(a) as charged in Count Six, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of criminal threats in violation of Penal Code section 422(a) as charged in Count One; assault with a firearm in violation of Penal Code section 245(a)(2) as charged in Counts Three and Four; and/or inflicting an injury on his cohabitant and/or someone with whom he had a dating relationship that resulted in a traumatic condition in violation of Penal Code section 273.5(a) as charged in Count Six. The People must still prove each charge beyond a reasonable doubt."

Pait contends the instruction is unconstitutional because it allowed the jury to convict him of the charged domestic violence offenses based on evidence of uncharged domestic violence proved by a preponderance of the evidence. Thus, he maintains the instruction lessened the People's burden of proof beyond a reasonable doubt.

The Attorney General notes Pait did not object below to this jury instruction and argues he forfeited his contention on appeal. Pait argues no objection was necessary to preserve the issue for appellate review under Penal Code section 1259, which provides in pertinent part, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial

rights of the defendant were affected thereby." As Pait argues his substantial rights were affected by the instruction, we review his contention on the merits.

As Pait acknowledges, the California Supreme Court rejected this same argument in reviewing a constitutional challenge to a parallel jury instruction regarding evidence of uncharged sex crimes. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 (*Reliford*).) The Court explained: "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense in 1991 involving S.B. The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity. In addition, the jury was told that circumstantial evidence could support a finding of guilt of the charged offenses only if the proved circumstances could not be reconciled with any other rational conclusion [citation]—which is merely another way of restating the reasonable-doubt standard. [Citation.] The jury thus would have understood that a conviction that relied on inferences to be drawn from defendant's prior offense would have to be proved beyond a reasonable doubt." (*Id*. at p. 1016.)

California appellate courts have applied *Reliford's* reasoning to CALCRIM No. 852. (*People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740; *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253.) We do the same and reject Pait's constitutional

challenge to this jury instruction. The instruction clearly states evidence of prior conduct is not sufficient by itself to find a defendant guilty of the charged offenses, and the charged offenses must be proved beyond a reasonable doubt.

III. Independent Review of In Camera Hearing on *Pitchess* Motion

As Pait requested, we have conducted an independent review of the sealed reporter's transcript of the May 5, 2016 in camera hearing on his *Pitchess* motion and have reviewed the trial court's decision regarding the discoverability of material in the officers' personnel files. The trial court did not err in finding there were no discoverable records to be released to the defense.

IV. Fines and Assessments

In a supplemental letter brief, filed after oral argument, Pait contends *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*), which was decided after he was sentenced, requires this court to remand the matter to allow the trial court to determine whether he has the ability to pay certain fines and assessments the trial court imposed.

A. Proceedings below

Before the trial court pronounced sentence, Pait addressed the court, stating he was a "productive member of society," who supported his two daughters "financially," as their "sole provider." He further stated: "I have worked diligently to build my business, owner and operator and independent contractor of my own trucking company. I delivered freight to 48 states, and I'm commercially licensed for 30 years."

As set forth above, the trial court sentenced Pait to six years, eight months in prison. The court also ordered Pait to pay the following fines and assessments: a $300 restitution fine (Pen.

Code, § 1202.4, subd. (b)); a $300 parole revocation fine, which was stayed unless parole was revoked (Pen. Code, § 1202.45), a $40 court operations assessment (Pen. Code, § 1465.8); and a $30 conviction assessment (Gov. Code, § 70373). Accordingly, the total amount due was $370. Pait did not object below to the imposition of these fines and assessments.

B. Legal standards and analysis

In *Duenas*, *supra*, 30 Cal.App.5th 1157, the Court of Appeal held "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Id*. at p. 1164.) The *Duenas* court further held "the execution of any restitution fine imposed under [Penal Code section 1202.4] must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid*.)

Assuming the issue is preserved for appeal, on the record before us, remand for a hearing on Pait's ability to pay the $370 in fines and assessments is not required. In assessing a defendant's ability to pay, a court may consider a defendant's "past income-earning capacity." (See *People v. Johnson* (2019) 35 Cal.App.5th 134, [4].) At the time of the sentencing hearing, Pait described himself as a "productive member of society," who owned his own trucking company and provided sole financial support for two daughters.

A defendant's ability to pay also includes consideration of "the defendant's ability to obtain prison wages." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Johnson*,

supra, 35 Cal.App.5th at p. [4].) Prisoners may earn wages ranging from $12 per month to $72 per month. (Cal. Dept. of Corrections & Rehabilitation, Operations Manual, §§ 51120.6, 51121.10 (2019).) Pait's sentence of six years, eight months will allow him to earn sufficient prison wages to pay the $370 in fines and assessments.

As the Court of Appeal aptly stated in *People v. Johnson*, *supra*, 35 Cal.App.5th 134: "[T]here is enough evidence in the trial record to conclude that the total amount involved here did not saddle [the defendant] with a financial burden anything like the inescapable, government-imposed-debt trap [the defendant in] *Duenas* faced.[11] [¶] Not only does the record show [the defendant here] has some past income-earning capacity, but going forward we know he will have the ability to earn prison wages over a sustained period. [Citation.] The idea that he cannot afford to pay $370 while serving an eight-year prison sentence [here, a sentence of six years, eight months] is unsustainable." (*Id.* at p. [4].)

In his supplemental brief, Pait does not reference his earnings history or his capacity to earn prison wages. The one sentence of his brief devoted to his ability to pay, states: "Appellant is indigent and has been represented by appointed

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[11] The defendant in *Duenas* was an unemployed woman with cerebral palsy, who had no home and could not "afford basic necessities for her family." (*Duenas*, *supra*, 30 Cal.App.5th at pp. 1160-1161.) She had outstanding debt from fees associated with prior infractions and misdemeanor convictions that she had been unable to pay. She objected in the trial court to the imposition of an additional $220 in fines and assessments on the ground she did not have the ability to pay. (*Id.* at pp. 1161-1163.)

counsel in the superior court and on appeal." That Pait lacked the ability to pay the costs of court-appointed counsel does not demonstrate he lacks the ability to pay $370 in fines and assessments. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 ["a defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine"].)

The record demonstrates Pait has the ability to pay the $370 in fines and assessments, given not only his financial status before he was incarcerated, but his capacity to earn prison wages during his six and a half year sentence. Accordingly, remand for an ability-to-pay hearing is unwarranted.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.